DCPI 1069/2006

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1069 OF 2006

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BETWEEN

SO CHO YIN Plaintiff

and

MTR CORPORATION LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in Court

Date of hearing: 5-6; 18 February 2008

Date of judgment: 7 April 2008

**JUDGMENT**

1. Kwai Fong MTR station is one of those stations where the platform is elevated from the ground level. On 14 November 2004, So (the Plaintiff), with her son and daughter, was taking one of the escalators from the platform to the concourse. The descending escalator suddenly stopped. So fell and was injured. Now she claims damages against the MTR (the Defendant).

**ISSUES**

1. The major issues in dispute are:
   1. how the accident happened;
   2. whether the accident was caused by the breach of duties on the part of the MTR as alleged;
   3. quantum of damages.

**HOW THE ACCIDENT HAPPENED**

1. There is no dispute that the escalator stopped suddenly at the time. Nor is there dispute that So fell. In dispute is how she came to fall and get injured.
2. According to her pleading and statement, So was standing on a step of the escalator with her (9-year-old) son. She held the handrail with her left hand and held her son’s hand with her right hand. Halfway down, the descending escalator suddenly stopped. The passengers behind her fell down and bumped into her back. Due to the force of the impact, So lost balance and fell on the escalator. In court, So added that her daughter was standing on the step behind her son. Upon the sudden stoppage of the escalator, she felt she was pressed by the passenger(s) from behind which caused her to dash forward for 2 to 3 steps and fall.
3. Mr Wong for the MTR referred to the medical records describing the accident. Mr Wong highlighted the variety of accounts said to have been given by So to these doctors seeing her at different stages after the accident. He also questioned her account given in court.
4. Indeed So did not lose consciousness during or after the fall. Yet her account in court of how she fell was neither impressive nor reliable. She could not tell whether any of these passengers from behind actually fell down. While she stressed that she held her son’s hand at the time, she could not even tell whether her son or her daughter fell too. On the other hand, the MTR’s record was that So was the only passenger fallen and injured during that escalator stoppage incident. I am on balance inclined to find that So was not as attentive as she alleged when she was on the escalator at the time. This rendered her vulnerable to losing her balance upon the sudden stoppage of the escalator.
5. Insofar as whether the MTR is liable for So’s injury, it actually matters not whether So fell because she was pressed by the passengers from behind or because she lost her own balance upon the stoppage of the escalator.

**WHETHER THE MTR IS LIABLE**

1. The MTR is being sued as the operator of the escalator. The causes of action are negligence and breach of occupier’s common duty of care. The duties under the two causes of action practically overlap. The existence of the duties is not denied. The issue is whether the MTR has been in breach.
2. In determining whether the MTR as operator and occupier of the escalator has discharged its duty, regard is to be had to all the circumstances, including those stipulated under section 3(4) of the *Occupier’s liability Ordinance*, Cap.314.
3. So criticised the MTR in these aspects: (1) the sudden stoppage and the speed of the escalator; (2) foreign object on the escalator; (3) safety warning; and (4) alternative egress from the platform.
4. *Kam Wai Ming v MTR Corporation Limited & CNIM-Hong Kong Limited*, DCPI 408/2002, 11 December 2003 was exactly a case where the plaintiff fell from an escalator inside a MTR station upon sudden stoppage of the escalator. That case became the first local case discussing (at paras.42-49 of the judgment) the principles applicable to determining liability of the operator and the contractor responsible for the escalator in this kind of accident. I applied those principles in my judgment in *Chan Ching Yuk v Otis Elevator Company (HK) Limited & Anor*, DCPI 248/2005, 11 September 2007 (at paras.35 and 38).
5. Similar considerations are applicable in the present case. Without any intention of limiting what were discussed in *Kam Wai Ming*, I summarise the key considerations as follows:
   1. Escalators are designed to stop and to stop quickly in certain circumstances. The fact that an escalator stopped unexpectedly per se cannot give rise to inference that it did so by virtue of negligence in its operation or maintenance. Sudden stoppage is one of the risks users must assume for the conveyance and utility of the ride.
   2. The escalator must react quickly in situations where people or things are caught in the device. Equally the device must not stop so suddenly as to propel riders off the steps. It is this balance of needs which is addressed by the various regulations and codes in relation to the speed and stoppage distances of such devices.
   3. It is the responsibility of the operator of the escalator to ensure that it is operated and maintained with a high standard of care. It is the responsibility of the users to use it with care, caution and alert attention.
   4. To succeed, the plaintiff must establish by evidence that reasonable care was not exercised in relation to the operation or maintenance of the escalator, which caused it to stop abruptly and thus demonstrated that it failed to meet the accepted standards for such a device; or if those standards were met, those standards inadequately addressed the potential risk faced by users of the device.
6. Though pleaded, Mr Wong for So conceded that the evidential rule of *res ipsa loquitur* is not applicable in the present case. This is in line with (1) of the preceding paragraph as well as the reality that the cause of the sudden stoppage of the escalator in the present case is known.

**Sudden stoppage and speed**

1. The design, construction and maintenance of escalators in Hong Kong are regulated by the Lifts and Escalators (Safety) Ordinance, Cap. 327 and the relevant Code of Practice issued under it by the Electrical and Mechanical Services Department. The speed, emergency braking mechanism and stopping distance upon braking are prescribed. In particular, the Code requires safety device which shall stop the escalator and maintain stationary in case any foreign object is trapped at the point where the steps, pallets or the belt entering the comb.
2. The maintenance and periodic examination and testing required of the escalators are also prescribed. The maintenance and repair, which affects the safe working of the escalator, must be carried out by a registered contractor. In the present case, the contractor is CNIM Hong Kong Ltd (CNIM).
3. The documents show that the weekly and half-annual inspections in accordance with the prescribed requirements have been carried out by CNIM. The half-annual inspection immediately prior to this incident showed normal operation of the escalator.
4. During the examination of the escalator after the accident, it was discovered that a screw was jammed at the comb-plate at the lower landing of the escalator. The 2.5cm-long screw was produced in court. This triggered the safety device and the braking. This was recorded in the occurrence report of CNIM and confirmed by Li, the technician of the MTR who witnessed the discovery of the screw and the examination of the escalator by CNIM’s technician.
5. After the removal of the screw, the escalator and the safety devices were examined but no abnormality was detected. In particular, Li explained the test performed to measure the stopping distance. It was found to be within the parameters prescribed by the Code.
6. Mr Wong for So submitted that simply complying with the statutory requirements is not enough. He referred to Li’s evidence that during the past 4 years, there were several sudden stoppage incidents on the escalators of the station. He submitted that the MTR management has failed to take any action to remove the risk of similar incident. What then could and should have been done to remove such risk? Mr Wong for So suggested that the speed of the escalator, though within limit, should have been reduced. There should also be device at the comb plate to prevent objects from jamming the machine and thus causing it to stop suddenly.
7. To begin with, the comb is there to trap foreign objects from feeding into underside of the system: see *Kam Wai Ming* at para.33. The screw would have been fenced off the escalator landing, had it simply kept rolling horizontally while the steps kept feeding into the underside at the lower landing. When cross-examining Li, Mr Wong for So was actually able to picture this scenario. In this case, the screw just happened to be jammed between the comb and the feeding step.
8. Mr Wong’s suggestions regarding the speed and the comb relate to the design and construction of the escalator. These technical aspects are already subject to stringent statutory specifications which I have no reason to doubt to be reflecting the safety needs. In the absence of endorsement by expert or proper evidence on the feasibility and compatibility of Mr’s suggestions with the statutory framework, I would not lightly accept these suggestions as the basis for finding or inferring negligence on the part of the operator of the escalator. Further, regarding these aspects, the MTR had to rely on CNIM as the registered contractor. There is no suggestion that CNIM is not a competent contractor to which the MTR entrusts these matters.
9. Considering the documents and evidence of Li, which I accept, I do not find the design or condition of the escalator to be questionable. I do not find the quality of the maintenance and testing of the escalator to be questionable either. There is no basis for suggesting that the MTR has failed to ensure that the escalator was functioning properly and safely at the time of the accident.

**Preventing foreign objects on the escalator**

1. Mr Wong for So suggested that there should have been warnings to the passengers to prevent objects from falling onto the escalators. To be meaningful, this suggestion must be something more specific than merely reminding passengers not to litter in any part of the MTR station.
2. The foreign object involved is a single small screw. There is no evidence how the screw came to exist on the escalator in the first place. It had probably dropped from a passenger; yet how this happened is unknown. Also bearing in mind its sort and size, I find that the effectiveness of such warning to prevent a foreign object like this screw from dropping from passengers onto the escalator is more perceived than realistic.
3. According to Tong, there was in place a cleaning schedule at the station. There was also patrol around the station. Mr Wong for So however criticised that the cleaners would clean the sides of the escalators and the handrails but there was no system for clearing any foreign objects or rubbish on the escalators.
4. Mr Wong for the MTR referred to *Wat Kwing Lok v KMB*, HCPI 936/2005, 20 November 2007 where the passenger stepped on an AA or AAA cylindrical battery on the upper deck of the bus and slipped. In the context of the duty of the carrier towards its passengers, the court (at paras.11-15) endorsed the principle that though bound to inspect its buses like any other common carrier, a bus company is not required to keep a continuous inspection or to know at each moment the condition of every part of a bus. The carrier is not liable for injuries occurring when a passenger slips on a foreign object, unless its employees placed it there or had an opportunity to notice the presence of such object and remove it. Mr Wong for the MTR submitted that by analogy, it is difficult to expect the MTR to foresee or to notice the presence of a foreign object such as the screw in the present case on the escalator in order to cast the burden on the MTR to prevent it from being or remaining there.
5. I agree with Mr Wong for the MTR. There is in the first place no evidence that the escalators were generally dirty. Requiring a system of cleaning or inspection with a view to eliminating the risk of the existence of foreign object like the screw on the escalator at a particular point of time would, in my judgment, be more than reasonable.

**Warning**

1. So and the other passengers should have used the escalator with care, caution and alert attention. The photographs of the escalator depict the clear warning signs affixed at the conspicuous parts of the escalator, reminding the passengers of the care required. Tong, the station officer, confirmed that those warnings existed at the time of the accident. He also said there was broadcast of safety warning in the station. In fact, So’s own case is that she was aware of the need to take such care. According to Tong, of the several occasions of escalator stoppage in the recent years, the present case is the only one involving injury to passenger. I accept his evidence.
2. I am satisfied that had So in fact taken such care and held the handrail properly and tightly, she should not have fallen upon the stoppage of the escalator. If the passengers behind her either fell or pressed to her upon the stoppage of the escalator, which I doubt, the fault for causing her to fall should lie with those passengers, not the MTR.

**Alternative egress**

1. There is basically no evidence regarding the design of the station to substantiate the alleged lack of alternative egress from the station to the concourse. In any event, there is no suggestion or evidence that So used the escalator mainly because she could not find alternative means to leave the platform for the concourse at the time. During closing, Mr Wong for So did not press on this argument.

**Conclusion**

1. Considering all the evidence, including those specifically analysed above, I find that So fails to prove liability of the MTR for the accident.

**ASSUMING BREACH**

1. For completeness, I proceed to consider the claim assuming breach is proved.

**Contributory negligence**

1. I repeat my observation in *Chan Ching Yuk* (at para.59). I agree with Mr Wong for the MTR that So would have been 50% responsible for her fall, even if the MTR is somehow liable.

**Injuries and treatment**

1. After the accident, So was sent to the hospital. She was found to have local tenderness at the left parietal area of her head, nasal bridge, back, buttock and the right ankle. There was no external wound, swelling, fracture or dislocation. The neck and right ankle movement was full. She was discharged with painkillers.
2. 2 days later, So was admitted to the hospital for having swallowed fish bone. However, on the same occasion, she complained about back pain radiating to her lower limbs. There was decrease in sensation and power diffusely over the left side of the body. But examination revealed no deformity, tenderness or muscle spasm. The neck was recorded to be normal. X-ray of the lumbo-sacral spine revealed mild osteoarthritis. Physiotherapy was suggested which was taken up until early July 2005.
3. During her subsequent visits to the hospital, So complained about decrease in sensation over the left side of her body and pain in the left wrist, neck and right ankle. Regarding the left wrist, examination revealed mild tenderness over the mid-dorsal aspect but no associated external wound, bruising, deformity or ligamental laxity. Regarding the ankle, there was some tenderness over both medial and lateral region, yet the motion range was good. Examination of the neck revealed percussion tenderness at the cervical thorax junction, thoracolumbar junction and lumbosacral junction with decreased neck and trunk movement range.

**Medical expert opinion**

1. Dr Lee Po Chin, the orthopaedic expert engaged on behalf of So, examined So in January 2006 and produced his report in the following month. Dr Henry C L Ho, the orthopaedic expert engaged on behalf of the MTR, examined So in December 2006 and produced his report in January 2007. Before both experts, So complained about pain and weakness over her low back, neck, left wrist and right ankle.
2. Dr Lee found tenderness at these regions but no root tension sign or definite neurological deficit of either limb. There was weakness in muscle power but no corresponding muscle atrophy. Dr Ho considered the severity of the diffuse weakness and pain demonstrated by So to be out of proportion to the physical findings. He too found no significant muscle wasting or disturbance of the reflexes. Further the presence of cogwheeling on strength testing indicated deliberate poor effort. Dr Ho also found no reasonable anatomical explanation for some of her reaction such as demonstrating pain in her left arm when only stroked light by hair. Dr Ho considered this to be likely psychological.
3. Both experts carried out the straight leg testing. Dr Lee found that the leg raising was full on both sides though there was deceased sensation of the left lower limb. When the test was performed before Dr Ho, there was a large discrepancy when the test was performed in the sitting position and the supine lying down position. When lying down, So was said to have actively resisted Dr Ho when he tried to perform the test, apparently to produce an abnormal physical sign.
4. Regarding the back, Dr Lee found no significant muscle spasm in the neck and the lumbar spine. There was no significant neurological involvement either. Before Dr Ho, So was observed to have deliberately moved and turned with difficulty allegedly because of her back pain. But Dr Ho too found no associated muscle spasm in So’s back to explain the severe debilitating back pain demonstrated.
5. Dr Lee assessed So to have suffered 8% impairment. This consisted of 5% for residual pain in the low back and buttock; 1% for the residual pain in the ankle and hand; and 2% for residual pain in the neck due to *possible* sprain injury. Dr Ho opined that So demonstrated a pain-focussed behaviour and exaggerated symptoms. Her injury was minor and should have recovered well with physiotherapy.
6. Lastly, regarding the left shoulder, Dr Lee noted that there was no medical record of her shoulder condition. He found the sign suggestive of frozen shoulder. While Dr Lee nevertheless proceeded to assess the residual stiffness of the left frozen shoulder to amount to another 5% impairment, he added that this was a self-limiting condition which would gradually resolve with time. Over 90% of persons with frozen shoulder normally regains functional range of movement and residual symptoms are usually not significant. Dr Ho opined that the neck and shoulder condition was the result of pre-existing degeneration in the cervical spine. He also reported that the condition was in any event not disabling enough to cause any noticeable wasting of the left arm and shoulder. In view of both experts’ scepticism about the relationship between the accident and the shoulder condition, and my assessment of So’s general reliability, I find that the shoulder condition is not related to the accident.
7. Both experts recommended no further treatment. Both opined that So was fit to resume her pre-accident job as security guard in a building. While Dr Lee added that there may be reduction in efficiency, he was apparently focussing on the effect of So’s left frozen shoulder.
8. The medical experts are essentially ad idem in their opinion and more importantly, in their physical findings. I also accept Dr Ho’s opinion that there was symptom exaggeration by So. In my judgment, this is really a case involving minor contusion injury to multiple areas with minor degree of disability.

**Pain, suffering and loss of amenities**

1. So is aged 46 at the time of the accident and now 50 years old. She is a working mother of two children.
2. Mr Wong for So submitted the award for PSLA should be HK$250,000 on the basis of numerous cases: *Ng Shing Kwai v Chan Yu Chuen & Anor*, HCPI 923/2001, 7 September 2002; *Asok GC v Kam Kee Construction Works Ltd & Anor*, HCPI 691/2004, 29 March 2006; and *Lee Yuk Lan v Royaltelle International Ltd*, HCPI 187/1995, 5 August 1999. Except for the last of them, these cases are, in my view, clearly more serious than the present one either in the way the victim got injured or in the degree of impairment.
3. Mr Wong for the MTR suggested no more than HK$50,000 on the basis of these cases: *Wong Shing Kam & Anor v Leung Ming Kwong*, DCPI 171/2005, 24 January 2006; *Yip Tung Fung & Ors v Pun Chi Leung*, DCPI 2149/2006, 23 November 2007; *Cheung Yu Tin Alvin v Ho Hon Ka*, DCPI 853/2004, 9 June 2005; and *Tam Yuen Hoi v Chan Muk Sing & Ors*, HCPI 983/2001, 1 August 2003. These cases involved injuries and degree of impairment less serious than those in the present one.
4. Assessment is on a case-by-case basis. I am of the view that this case would have warranted an award of HK$100,000.

**Loss of earnings**

1. So earned a salary of HK$5,327.40 immediately prior to the accident. During submissions, it was confirmed that the pre-trial loss of earnings was agreed. The amount inclusive of MPF benefits was HK$106,281.63.

**Loss of earning capacity**

1. So claims an amount of HK$50,000. Mr Wong for the MTR submitted that taking into account her salary and the sick leave already taken until 2006, the reasonable award for any disadvantage in the labour market, if any, should be no more than about half a year’s income. I agree with him and his proposed sum of HK$30,000.

**Special damages**

1. Medical expenses in the sum of HK$9,725 and travelling expenses in the sum of HK$5,455.30 were agreed.
2. The major dispute lies with the claim for expenses on tonic food. They consists of HK$85,849 for Chinese herbs, HK$5,171 for herbalist and HK$19,819 for medical plasters. Not only was the amount claimed extraordinarily high, but So’s evidence on why she needed these items, why she bought these items in such quantities and how she managed to pay for them was also utterly unacceptable. Mr Wong for the MTR submitted, and I agree, HK$5,000 would have been reasonable allowance for this item of claim in the circumstances.

**Summary**

1. But for her failure to prove liability, the damages would have been as follows:

PSLA HK$100,000.00

Loss of earnings (inclusive of MPF) HK$106,281.63

Loss of earning capacity HK$ 30,000.00

Miscellaneous special damages

Medical expenses HK$ 9,725.00

Travelling expenses HK$ 5,455.30

Tonic food HK$ 5,000.00

Total: HK$256,461.93

1. There would have been interest up to day: on the damages for PSLA at 2% per annum from the date of writ; and on loss of earnings and the miscellaneous special damages at half judgment rate from the date of accident. The final amount would have to be deducted by 50% to account for the contributory negligence.

**ORDER**

1. Failing to prove liability, So’s claim is dismissed. I make a nisi order that So should bear the MTR’s costs of this action, including any costs reserved. Costs shall be taxed if not agreed. So’s own costs shall be taxed subject to legal aid regulations. For clarity, I certify the engagement of counsel. This costs order shall become absolute in the absence of appointment in 14 days to argue costs.

Simon Leung

District Judge

Representation:

Mr Kevin Wong instructed by Messrs Reimer & Partners for the Plaintiff on the instruction of the Director of Legal Aid

Mr C K Wong instructed by Messrs Deacons for the Defendant